

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANGEL G.,)	
)	
Appellant,)	2 CA-JV 2009-0046
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY,)	Appellate Procedure
SELENA G., and CARMEN G.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17917700

Honorable Patricia G. Escher, Judge

AFFIRMED

Joan Spurney Caplan

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

HOWARD, Chief Judge.

¶1 Angel G. appeals from the juvenile court’s order of April 22, 2009, terminating his parental rights to his children, Selena and Carmen, on grounds of neglect or abuse, *see* A.R.S. § 8-533(B)(2), and Angel’s inability to rectify the circumstances that had caused the children to be in a court-ordered, out-of-home placement for a cumulative period of fifteen months or longer, with no substantial likelihood by the time of the contested termination hearing that he would be able to parent effectively in the near future, *see* § 8-533(B)(8)(c).¹ On appeal, Angel challenges the sufficiency of the evidence to sustain either statutory ground and also contends § 8-533(B)(8)(c) is unconstitutionally vague and ambiguous. We affirm.

¶2 Before it may terminate a parent’s rights, a juvenile court must find by clear and convincing evidence the existence of at least one statutory ground for severance, and it must find by a preponderance of the evidence that terminating the parent’s rights is in the child’s best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005).

¶3 On appeal, we view the evidence in the light most favorable to sustaining the juvenile court’s ruling, *Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005), and we accept the court’s findings of fact as long as substantial evidence exists to support them. *Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, ¶ 4, 210 P.3d 1263, 1264 (App. 2009). We will affirm the court’s ruling unless we can “say as a matter of law that no one could reasonably find the evidence [supporting statutory grounds

¹The motion for termination also alleged chronic substance abuse as a ground for termination pursuant to § 8-533(B)(3), but the juvenile court later granted Angel’s motion for a directed verdict and dismissed that allegation.

for termination] to be clear and convincing.” *Id.* ¶ 10, quoting *Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (alteration in *Denise R.*).

¶4 The pertinent facts are set forth in considerable detail in the juvenile court’s minute entry, and we will not belabor them here. In summary, Selena and Carmen were removed from their parents’ custody in August 2006 based on reports of substance abuse by both parents, domestic violence between the parents, and neglect of the children. Concurrently, the Arizona Department of Economic Security (ADES) initiated dependency proceedings, and the children were adjudicated dependent the following month.²

¶5 ADES offered the parents extensive services aimed at rehabilitating and reunifying the family. Angel participated in many of the services offered, was intermittently in substantial compliance with his case plan tasks, and appeared at times to be making progress toward reunification with his children.

¶6 Between August 2007 and November 2008, the juvenile court deferred its permanency determination several times to give Angel additional time to demonstrate his readiness to parent. In October 2008, however, his case manager determined that Angel had been allowing unauthorized contact between the children and their mother, in violation of a

²The adjudication followed Angel’s admission to the following allegations in an amended dependency petition: Child Protective Services had received a report in April 2006 Angel and his wife were neglecting their daughters, using drugs, and “party[ing] all night.” Two days after that report, Angel had tested positive for cocaine and alcohol. In addition to the parents’ substance abuse issues, they also had a history of domestic violence. Angel had been arrested and ordered by the court to participate in a program for domestic violence offenders. He had also allowed the children to have contact with their maternal uncle, a registered sex offender. Finally, Angel admitted that his daughters had had a history of a chronic infestation of head lice.

safety plan Angel had signed in May 2007. As a result, ADES suspended his unsupervised visits with the children, and the court changed the permanent case plan goal to one of severance and adoption. By the time the motion to terminate Angel’s parental rights was filed on November 12, 2008, seven-year-old Selena and four-year-old Carmen had been living in a potential adoptive foster placement for more than twenty of the approximately twenty-seven months since their removal from their parents’ custody.

¶7 In reviewing Angel’s contentions that there was not clear and convincing evidence to support the termination of his rights under the statutory grounds alleged, we may affirm the juvenile court’s order if we find the evidence sufficient to sustain either one of the grounds on which the court found severance justified. *See Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d 682, 685, 687 (2000). If substantial evidence supports any one ground, we need not consider Angel’s arguments pertaining to any other grounds. *Id.* ¶ 27. Here, however, the evidence supporting both statutory grounds was straightforward and convincing.

¶8 Proof of Angel’s neglect of his daughters for purposes of § 8-533(B)(2)³ included evidence that the girls had a history of a severe, chronic infestation of head lice. As

³To justify severance pursuant to § 8-533(B)(2), the state was required to prove that Angel had “neglected or wilfully abused a child.” Section 8-533(B)(2) provides that such abuse “includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.” *See also* A.R.S. § 8-201(2) (defining “[a]buse”) and § 8-201(21) (defining “[n]eglect” or “neglected”). Although the juvenile court’s ruling states it found Angel had “neglected or abused” his children, counsel for ADES stated at the outset of the termination hearing that ADES was intending to proceed on the theory of neglect, not abuse.

the Child Protective Services investigator wrote in her report to the court, the girls' lice infestations dated to at least December 2004; in August 2006, after they were taken into protective custody,

several treatments and hours of combing the children's hair still failed to remove all of the nits. Also, at the time of removal the children were filthy and their hair was tangled to the point that it required hours of combing with conditioner to remove what appeared to be months of tangles.

Despite multiple treatments for head lice after arriving at the foster home, Carmen "still had nits in her hair one week after removal" from her parents' custody. In addition, Selena had extensive tooth decay and dental issues. She required four surgical extractions and seventeen fillings to repair the damage. The evidence convincingly demonstrated neglect for purposes of § 8-533(B)(2) and A.R.S. § 8-201(21).

¶9 With respect to § 8-533(B)(8)(c),⁴ the evidence that Angel had not remedied the circumstances that required his children to remain in foster care pursuant to court order included his difficulties maintaining steady employment, stable housing, and sobriety, but also, primarily, his failure to honor the requirement that he protect the children by preventing contact between them and their mother. *See generally Marina P. v. Ariz. Dep't of Econ. Sec.*,

⁴To justify severance pursuant to § 8-533(B)(8)(c), ADES must prove that a child

has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order . . . , the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007) (circumstances necessitating out-of-home placement for purposes of § 8-533(B)(8) are those existing at time of severance hearing, not at time of initial dependency petition).

¶10 Here, not only had the girls' mother continued to use drugs but, on one of their visits, they had seen her being choked by her boyfriend, an episode both children had found extremely traumatic. Despite Angel's denials that such contact had ever occurred, other evidence was sufficient to support the court's finding that such unauthorized contact with the children's mother had been convincingly shown. *See generally State v. Garfield*, 208 Ariz. 275, ¶ 9, 92 P.3d 905, 907-08 (App. 2004) (existence of conflicting evidence did not render contrary evidence insufficient to support conviction); *Kocher v. Ariz. Dep't of Revenue*, 206 Ariz. 480, ¶ 9, 80 P.3d 287, 289 (App. 2003) ("A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists.").

¶11 Because the record contains substantial evidence from which the juvenile court could find that either statutory ground for severance had been proven clearly and convincingly, we reject Angel's first and second arguments. His third contention, that § 8-533(B)(8)(c) is unconstitutionally vague and ambiguous, he has waived by failing to present the issue to the court. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (failure to allege error in trial court waives issue on appeal, absent extraordinary circumstances); *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 437, 581 P.2d 271, 282 (App. 1978) (declining to consider issue first raised on appeal). And, in any event, because the evidence was sufficient to support the termination of Angel's rights pursuant to § 8-533(B)(2), based

on neglect, we need not consider his arguments pertaining to other statutory grounds on which the court found termination was also justified. *Michael J.*, 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d at 685, 687.

¶12 Because substantial evidence supported both of the statutory grounds for termination on which the juvenile court ruled and also demonstrated that severance was in the children's best interests, we reject Angel's contentions to the contrary and affirm the court's order of April 22, 2009, terminating his parental rights to Selena and Carmen.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge